

S.1895

Private Property Rights Protection Act (Introduced in Senate)

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109th CONGRESS
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S. 1895

To return meaning to the Fifth Amendment by limiting the power of eminent domain.

IN THE SENATE OF THE UNITED STATES

October 19, 2005

Mr. ENSIGN (for himself, Mr. INHOFE, and Mr. DEMINT) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To return meaning to the Fifth Amendment by limiting the power of eminent domain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Private Property Rights Protection Act'.

SEC. 2. FINDINGS.

Congress finds the following:

- (1) The founding fathers held dear the fundamental rights associated with the ownership of private property.
- (2) In 1788, James Madison recognized the connection between freedom and property rights when he wrote in Federalist No. 10 that the right to own property originates in free thought and that it is the Government's job to protect such rights.
- (3) In 1792, in an essay entitled `Property', James Madison wrote, `where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.'.
- (4) In the `Property' essay James Madison also wrote, `Government is instituted to protect property of every sort. . . . This being the end of

government, that alone is a just government, which impartially secures to every man, whatever is his own.'

(5) In 1775, the Virginia patriot Arthur Lee wrote, 'The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.'

(6) In 1783, Benjamin Franklin wrote, 'All the property that is necessary to a Man, for the Conservation of the Individual and the Propagation of the Species, is his natural Right, which none can justly deprive him of.'

(7) In 1787, John Adams wrote, 'The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.'

(8) In 1795 Supreme Court Justice William Patterson wrote, in the case *Vanhorne's Lessee v. Dorrance*: 'From these passages it is evident; that the right of acquiring . . . property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labor and industry. The preservation of property then is a primary object of the social compact, and . . . was made a fundamental law.'

(9) In 1798, the Supreme Court considered the case of *Calder v. Bull*, in which Justice Samuel Chase recognized that government action which is 'contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority' which he explained with the following example: ' . . . a law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers . . . '.

(10) On March 6, 1860, Abraham Lincoln stated that the institution of slavery is reprehensible because it offends the right of man to keep the fruits of his own labor and thus denies man the right to own property.

(11) In a stark departure from the honor and recognition given individual private property rights under the United States Constitution, the United States Supreme Court in the case of *Kelo v. City of New London*, issued a decision on June 23, 2005, by a 5 to 4 vote, that eminent domain may be used to seize property for the purpose of private economic development.

(12) Justice Sandra Day O'Connor rightly stated in her dissenting opinion in *Kelo*, 'the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.'

(13) Justice O'Connor further wrote, 'any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.'

(14) Justice O'Connor also wrote about the effects of the Kelo ruling: 'To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings 'for public use' is to wash out any distinction between private and public use of property--and thereby effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment.'

(15) Justice Clarence Thomas wrote, 'I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution.'

(16) The City Council of New London, Connecticut, created the New London Development Corporation ('NLDC') as a 501(c)(3) non-profit organization and authorized the NLDC to purchase property or to acquire private property for economic development purposes by exercising eminent domain in the City's name.

(17) NLDC's actions, which were the subject of the lawsuit in the Kelo case, were made possible by numerous Federal grants and direct appropriations, including: \$2,000,000 from the Economic Development Administration in 2001, \$750,000 from the Department of Labor in 2000, \$125,000 from the Fannie Mae Foundation in 2000, and an earmark of \$100,000 in the FY2001 VA-HUD appropriations Act (Public Law 106-988).

(18) The Kelo decision stands as a repudiation of the principle of the Fifth Amendment, as embodied by the writings of James Madison, Benjamin Franklin, John Adams, and Abraham Lincoln, and also as had previously been recognized by the Supreme Court.

(19) Congress has encouraged the State and local governments' practice of using eminent domain to further economic development by using the Federal purse strings to incentivize such practices through Federal grants and direct appropriations.

(20) Congress has also created extensive tax-based incentives to encourage State and local governments to condemn private property for economic development purposes.

(21) In a joint amicus brief, the National Association for the Advancement of Colored People and the American Association of Retired Persons stated, 'The takings that result [from the Court's decision in Kelo] will disproportionately affect and harm the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly.'

(22) The Supreme Court's decision to expand eminent domain is also troubling for religious institutions, as this ruling will disproportionately negatively impact these institutions as they are often non-profit and almost universally tax-exempt. As a result, the property owned by religious institutions is particularly vulnerable to this type of taking, as the ruling of the court disfavors non-profit, tax-exempt property owners in favor of for-profit, tax generating businesses.

(23) It is in the best interest of the American people for Congress to prohibit Federal funding and to restrict tax benefits from accruing to any

person, party, or governmental authority who would seek to acquire private property through seizure by eminent domain for economic development purposes.

(24) Congress can restrict the use of Federal funds and the availability of Federal tax incentives to discourage the activities of State and local governments.

(25) It is the responsibility and obligation of Congress to act to protect private property rights and to further the protections afforded to private parties by the United States Constitution under the Fifth Amendment and to prevent the unjust use of the power of eminent domain.

SEC. 3. DEFINITIONS.

For purposes of this Act:

(1) **ACQUIRING PARTY**- The term `acquiring party' means any person or party that acquires a real property interest from a condemning authority, which took title to such real property interest by the use of eminent domain or the threat of the use of eminent domain, including any--

- (A) individual;
- (B) trust;
- (C) charity;
- (D) corporation;
- (E) partnership; or
- (F) limited liability company.

(2) **BLIGHTED PROPERTY**- The term `blighted property' includes any--

- (A) property which because of physical condition, use, or occupancy constitutes a public nuisance or attractive nuisance;
- (B) dwelling which, because it is dilapidated, unsanitary, unsafe, vermin-infested, or lacking in the facilities and equipment required by the housing code of the municipality, is unfit for human habitation;
- (C) structure which is a fire hazard, or is otherwise dangerous to the safety of persons or property;
- (D) structure the utilities, plumbing, heating, sewer, or other utility services of which have been disconnected, destroyed, moved, or rendered ineffective such that the property is unfit for its intended use;
- (E) vacant or unimproved lot or parcel of ground in a predominately built-up-neighborhood, which by reason of neglect or lack of maintenance has become a place for accumulation of trash and debris or a haven for rodents or other vermin;
- (F) property that has tax delinquencies exceeding the fair market value of the property;
- (G) property with code violations affecting health or safety that has not been substantially rehabilitated within 1 year of the receipt of

notice to rehabilitate from the appropriate housing code enforcement agency; or

(H) abandoned property.

(3) CONDEMNING AUTHORITY- The term `condemning authority' means any authority, utility, or co-operative which exercises the power of eminent domain either directly or by a delegation of power, including any-

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(A) State;

(B) county;

(C) municipality,

(D) city;

(E) town, whether private or public;

(F) corporation, whether for profit or not for profit; and

(G) district.

(4) GOVERNMENT- For purposes of sections 6, 7, and 8, the term `government'--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) INCIDENTAL ECONOMIC BENEFIT- The term `incidental economic benefit'--

(A) means the use of any property for any project that is neither--

(i) a public use; or

(ii) a public purpose; and

(B) includes projects which rely on eminent domain to acquire property and which are done--

(i) for the purpose of enhancing or increasing the tax base of a condemning authority;

(ii) for the purpose of creating jobs within the jurisdiction of a condemning authority; or

(iii) in furtherance of economic development.

(6) PROPERTY OWNER- The term `property owner' means any person with a real property interest, whether possessory or not, that is being taken under the power of eminent domain.

(7) PUBLIC PURPOSE- The term `public purpose'--

(A) means the use of property acquired by eminent domain that furthers a legitimate governmental purpose to directly and substantially protect the health, safety, and welfare of the public; and

(B) includes--

- (i) condemnation of any severely blighted property;
- (ii) the development of any property to provide public utilities, including--
 - (I) electric;
 - (II) gas;
 - (III) phone;
 - (IV) cable;
 - (V) water service and sewer; and
 - (VI) wi-fi networks;
- (iii) hydro-electric projects and flood control measures;
- (iv) development of waste, recycling, and waste treatment facilities; and
- (v) development of any property to provide an essential public health or safety service such as a privately operated prison or hospital.

(8) PUBLIC USE- The term 'public use'--

(A) means any use of property acquired by eminent domain that is-

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- (i) used by a governmental entity;
- (ii) owned, operated, or maintained by a government entity and used by the public as a right-of-way; or
- (iii) used by a common carrier; and

(B) includes--

- (i) right-of-ways;
- (ii) roadways;
- (iii) highways;
- (iv) interstates;
- (v) interchanges;
- (vi) bike paths;
- (vii) waterways and navigable waters;
- (viii) airports, railroads, and other transportation needs; and
- (ix) public parks and public buildings, including--
 - (I) schools;
 - (II) hospitals;
 - (III) prisons;
 - (IV) government buildings; and
 - (V) sports stadiums, theaters, or other public entertainment venues provided that any takings for these projects is limited solely to the real property necessary for--

(aa) the construction of such stadiums, theaters or venues; and

(bb) parking facilities and public transportation and access roads to and from such stadiums, theaters or venues.

- (9) REAL PROPERTY INTEREST- The term 'real property interest' means any--
- (A) fee title interest;
 - (B) lease interest;
 - (C) easement;
 - (D) development rights;
 - (E) mineral rights;
 - (F) water rights;
 - (G) rights in real property related to sky, air, or vision which affect the value of such real property; or
 - (H) future interest in any of the real property interests or rights described in subparagraphs (A) through (G).

SEC. 4. DENIAL OF FEDERAL FUNDS FOR TAKINGS NOT FOR THE PUBLIC USE.

(a) Denial of Funds- A condemning authority or acquiring party that engages or participates in a taking or condemnation of any real property interest not for a public use or public purpose, without the consent of the owner of such real property interest, under the power of eminent domain pursuant to the Fifth Amendment of the United States Constitution, or under any relevant State constitution, statute, or regulation, shall not be eligible to receive any Federal funds, including any funds appropriated by Congress or otherwise expended from the Federal treasury.

(b) Certification of Eligibility to Receive Funds-

(1) IN GENERAL- Any entity applying for Federal funds shall certify to the appropriate Federal agency, under penalty of perjury, that any funds it receives will not be used to--

- (A) develop any real property which is subject to or otherwise subsequently becomes subject to a Fifth Amendment property protection statement;
- (B) further any economic development associated with an exercise of eminent domain power which is not in furtherance of a public use or public purpose; or
- (C) provide, further, or enhance an incidental economic benefit.

(2) REGULATIONS REQUIRED- The Secretary of the Treasury shall promulgate rules and regulations to establish the procedures and rules regarding the certification required under paragraph (1), including--

- (A) certification language; and
- (B) application forms.

(3) NOTICE TO THE IRS- Each Federal agency shall forward a copy of each certification required under paragraph (1) that it receives to the Commissioner of Internal Revenue.

(4) AUDITS-

- (A) AUTHORITY- The Commissioner of Internal Revenue may conduct an audit of any condemning authority or acquiring party

that has made a certification under paragraph (1) and may review such books, records, and materials as the Commissioner determines appropriate.

(B) REIMBURSEMENT OBLIGATION- If after an audit of a condemning authority or acquiring party, the Commissioner of Internal Revenue determines that the condemning authority or acquiring party violated the terms of the certification required under paragraph (1), the condemning authority or acquiring party shall reimburse the Department of the Treasury for any funds--

- (i) received from any Federal agency;
- (ii) expended by the Secretary of the Treasury in conducting the audit; and
- (iii) together with interest, compounded annually at a rate of 12 per centum, calculated from the date of disbursement of such funds until the obligation has been repaid.

(C) AUDIT OF PRIOR PERIODS- An audit conducted under this paragraph--

- (i) shall not be limited to the year in which a suspected violation of the terms of the certification required under paragraph (1) occurs; and
- (ii) may extend back to cover any year or years in the period beginning 10 years prior to the year such audit commences.

(D) APPEAL- The United States Court of Federal Claims shall have original and exclusive jurisdiction over any appeal by a condemning authority or acquiring party of any reimbursement obligation imposed under subparagraph (B).

SEC. 5. DENIAL OF TAX BENEFITS FOR TAKINGS NOT FOR THE PUBLIC USE.

(a) Fifth Amendment Property Protection Statement-

(1) IN GENERAL- Upon receipt of a notice from a condemning authority which states the intent of the condemning authority to initiate an eminent domain proceeding against a real property interest of a property owner, any property owner who receives such notice may file a Fifth Amendment property protection statement (in this section referred to as a "PPS") with the appropriate State or local agency responsible for recording deeds, liens, or mortgages of real property in which the affected real property interest is located, provided that the property owner files the PPS not later than 90 days after the receipt of such notice.

(2) CONTENTS OF PPS- Each PPS described in paragraph (1) shall state the basis on which the property owner believes that a condemning authority has exceeded its authority in exercising its eminent domain power to take or condemn the real property interest of the property owner,

including by using or intending to use such taking or condemnation to create an incidental economic benefit.

(3) **FILING COPY OF PPS WITH THE COMMISSIONER OF INTERNAL REVENUE-** A property owner may submit a copy of each PPS such property owner filed under paragraph (1) to the Commissioner of Internal Revenue.

(4) **VOLUNTARY RELEASE OF PPS-**

(A) **IN GENERAL-** A property owner, the personal representative of a property owner, the estate of a deceased property owner, or any qualified heir of a deceased property owner (as such term is defined in section 2032A(e) of the Internal Revenue Code) may voluntarily file a document terminating a PPS with the appropriate State or local agency responsible for recording, deeds, liens, or mortgages of real property in which the affected real property interest is located.

(B) **EFFECT-** The effect of filing a termination of PPS under subparagraph (A) shall be to void such PPS.

(5) **INVOLUNTARY RELEASE OF PPS-**

(A) **IN GENERAL-** A condemning authority may seek a judicial determination of the validity of any timely filed PPS in any State court having jurisdiction over takings or condemnation proceedings in the State in which the affected real property interest is located.

(B) **BURDEN OF PROOF-** In any case initiated under subparagraph (A), a condemning authority shall bear the burden of proof in demonstrating that such taking or condemnation is not inconsistent with section 6(a).

(C) **FINAL ORDER-** Upon a final determination of any court described in subparagraph (A) that such taking or condemnation does not violate section 6(a), the court may enter an order releasing the PPS.

(6) **FORM OF PPS-** The Secretary of the Treasury shall establish a uniform format for all PPS and releases of PPS to be used by property owners.

(b) **Rules of Construction-**

(1) **IN GENERAL-** A PPS is intended to enhance the property protections afforded by the Fifth Amendment by permitting a property owner to take action to discourage those takings which are not in furtherance of either a public use or public purpose.

(2) **EFFECT OF PPS ON COMPENSATION AWARD TO PROPERTY OWNER-** Any compensation awarded for a taking pursuant to the Fifth Amendment shall be made without regard to any PPS attaching to the property being taken.

(3) **ADDITIONAL EFFECTS OF A PPS-** A PPS shall--

(A) attach to the real property interest which is described in the PPS; and

(B) bind the current owner and all future owners, including successor in interests, assigns, or heirs, who at any time hold title to all or any portion of such real property interest.

(c) Tax Effects of PPS- For a period of 20 years beginning on the January 1st immediately following the date of recording of any PPS, any acquiring party which acquires any real property interest which is subject to a PPS shall be prohibited from claiming any benefit, deduction, or tax credit related to any activities conducted within the geographical boundaries comprising the jurisdiction of the condemning authority under the Internal Revenue Code of 1986, including the following:

- (1) Section 27 (relating to taxes of foreign countries and possessions of the United States; possession tax credit).
- (2) Section 38 (relating to general business credits).
- (3) Section 39 (relating to carryback and carryforward of unused credits).
- (4) Section 40 (relating to alcohol used as a fuel).
- (5) Section 41 (relating to credit for increasing research activities).
- (6) Section 42 (relating to low-income housing credit).
- (7) Section 45 (relating to electricity produced from certain renewable resources).
- (8) Section 45A (relating to Indian employment credit).
- (9) Section 45B (relating to credit for portion of employer social security taxes paid with respect to employee cash tips).
- (10) Section 45C (relating to clinical testing expenses for certain drugs for rare diseases or conditions).
- (11) Section 45D (relating to new markets tax credit).
- (12) Section 45E (relating to small employer pension plan startup costs).
- (13) Section 45F (relating to employer-provided child care credit).
- (14) Section 47 (relating to rehabilitation credit).
- (15) Section 103 (relating to interest on State and local bonds).
- (16) Section 162 (relating to trade or business expenses).
- (17) Section 163 (relating to interest).
- (18) Section 164 (relating to taxes).
- (19) Sections 165 and 166 (relating to ordinary losses)
- (20) Section 167 (relating to depreciation).
- (21) Section 169 (relating to amortization of pollution control facilities).
- (22) Section 172 (relating to net operating loss deduction).
- (23) Section 174 (relating to research and experimental expenditures).
- (24) Section 175 (relating to soil and water conservation expenditures).
- (25) Section 178 (relating to authorization of cost of acquiring a lease).
- (26) Section 179 (relating to election to expense certain depreciable business assets).
- (27) Sections 48(g) and 170(h) (relating to Federal Historic Preservation Tax Incentives).
- (28) Section 198 (relating to Brownfields Tax Incentives).
- (29) Sections 1201 through 1298 (relating to capital losses).
- (30) Section 1400F (relating to Renewal Communities).

(31) Sections 1391 through 1398 (relating to Empowerment Zones and Enterprise Communities Tax Incentives).

SEC. 6. PROTECTION OF PERSONAL PROPERTY RIGHTS.

(a) General Rule- No government shall engage or participate in a taking or condemnation of any private real property interest under the power of eminent domain for any purpose unless such taking or condemnation is either a public purpose or a public use.

(b) Scope of Application- This section applies in any case in which the exercise of eminent domain--

(1) is by the Federal Government;

(2) is related to a program or activity that receives Federal financial assistance; or

(3) would affect, commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 7. JUDICIAL RELIEF.

(a) Cause of Action-

(1) IN GENERAL- A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

(2) STANDING- Standing to assert a claim or defense under paragraph (1) shall be governed by the general rules of standing under article III of the Constitution.

(b) Jurisdiction- Any pending action under which a government exercises its authority of eminent domain shall not operate as a limit on a court from hearing any claim for relief under this Act.

(c) Burden of Persuasion- If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Fifth Amendment takings clause or a violation of section 6, the government shall bear the burden of persuasion on any element of such claim.

(d) Full Faith and Credit- Adjudication of a claim of a violation of this Act in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(e) Attorneys' Fees- Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended by inserting 'the Private Property Rights Protection Act,' after 'the Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C. 2000cc et seq.),'.

(f) Authority of United States to Enforce This Act-

(1) IN GENERAL- The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act.

(2) LIMITATION- Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General,

the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

SEC. 8. RULES OF CONSTRUCTION.

(a) Broad Construction- This Act shall be construed in favor of a broad protection of personal property rights, to the maximum extent permitted by the terms of this Act and the Constitution.

(b) No Preemption or Repeal- Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of personal property rights as, or more protective of personal property rights than, this Act.

(c) Severability- If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.